ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
JAMES A. KAY, JR.	)	
	)	WT DOCKET NO. 94-147
Licensee of one hundred sixty	)	
four Part 90 licenses in the	)	
Los Angeles, California area	)	
	)	

To: Administrative Law Judge Richard L. Sippel

MOTION FOR PARTIAL SUMMARY DECISION

JAMES A. KAY, JR.

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Dated: April 17, 1995

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Summary of the Filing

James A. Kay Jr., by his attorneys, respectfully requests that the Presiding Judge grant his Request for Permission to File Motion for Partial Summary Decision and that the Presiding Judge grant his Motion for Partial Summary Decision as to those issues where there is no genuine issue of material fact for determination at hearing.

Kay has examined each of the designated issues in certain numbered paragraphs in the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994) ("HDO"). Kay's reasons for requesting that the Presiding Judge enter a motion for partial summary decision with respect to: issue 10(a); 10(c); 10(d); 10(e); 10(f); and 10(h) of the HDO clearly demonstrate that the Bureau has failed to present any genuine issue of material fact with respect to whether James A. Kay, Jr., has violated the specific provisions of the Commission's Rules and or the Communications Act of 1934 as amended and enumerated in those sections of the HDO in which Kay respectfully requests partial summary decision. The Bureau has failed to state any genuine issue of material fact for determination at hearing and partial summary decision should be granted as to those issues where there is no genuine issue of material fact.

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To: Administrative Law Judge Richard L. Sippel

MOTION FOR PARTIAL SUMMARY DECISION

James A. Kay, Jr. (Kay), by his attorneys, pursuant to Section 1.251(a)(1) of the Commission's Rules, respectfully requests that the Presiding Judge enter a partial summary decision as to those matters where there is no genuine issue of material fact for determination at hearing. In support of his position, Kay shows the following:

For the convenience of the Bureau and the Presiding Judge, Kay will request that the Presiding Judge enter a partial summary decision with respect to each of the issues in certain numbered paragraphs in the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994) ("HDO"). Since Kay has previously addressed the issues in the HDO by specifically numbered interrogatories, Kay will again reference those interrogatories in the same manner as used by the Presiding Judge in his Order Released April 7, 1995 (FCC 95M-102).

Issue 10(a)

Issue 10(a) of the HDO directed the Presiding Judge "to determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and or Section 1.17 of the Commission's Rules by failing to provide the information requested in his responses to the Commission inquiries," HDO at paragraph 10(a) (footnotes omitted). A careful reading of Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. §308(b)(Section 308(b)), finds that the statute is a grant of authority to the Commission. However, Section 308(b) does not, by its terms, impose any duty on any person to do or not to do anything. Section 308(b) does not require the Commission to make any inquiry of any person. Section 308(b) does not impose any duty on either an applicant or a licensee to respond in any way to a Commission inquiry. Accordingly, Section 308(b) is not a statute which an applicant or a licensee can violate, and therefore there cannot logically be any genuine issue of material fact concerning an alleged violation of Section 308(b) by Kay. Congress left to the Commission the task of implementing Section 308(b) by adoption of an appropriate rule. The Commission adopted Rule Section 1.17 which provides that:

> The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission. No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

47 C.F.R. §1.17. For an applicant, permittee or licensee to violate Rule Section 1.17, the person would have to make a misrepresentation or willful material omission bearing on any

matter within the jurisdiction of the Commission. There is no genuine issue of material fact concerning any alleged violation of Rule Section 1.17 by Kay.

At paragraph No. 1 of the HDO, the Commission alleged that "Kay has failed to respond to Commission requests for written statements of fact required under §308 of the Communications Act of 1934 as amended," HDO at paragraph 1. At Interrogatory 1-2 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease state each fact on which the Commission relies for its position that Kay failed to respond to Commission requests for written statements of fact required under Section 308 of the Communications Act of 1934 as amended." In his Order released on April 7, 1995 (FCC 95M-102) (the April 7 Order), the Presiding Judge found that the Bureau's "reference to documents and the documents themselves, copies of which are in Kay's possession or were furnished by Kay by the Bureau, provide a full and complete answer to the interrogatory." *id.* at 2.

At Interrogatory 1-4 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease state with particularity each fact which Kay failed to supply in response to a Commission request for a written statement of fact required under Section 308 of the Communications Act of 1934 as amended which is relevant to a determination whether any license granted to Kay should be revoked." In his April 7 Order, the Presiding Judge found that "the Bureau responded by producing copies of each of the letters [from the Bureau to Kay] and Kay's responses. The Bureau believes that a narrative description of those items would be redundant. The Presiding Judge agrees with that assessment," *id* at 2. Accordingly, debate

concerning the Bureau's disclosures in response to Kay's interrogatories 1-2 and 1-4 is at a close, and the responses provided by the Bureau should be deemed to constitute all of the material facts in the Bureau's possession which would be responsive to Kay's interrogatories.

Kay provided by his interrogatories an opportunity for the Bureau to come forward with any material fact which he had misrepresented or willfully omitted. In response, the Bureau failed to state any fact in response to Kay's interrogatories which Kay had misrepresented or willfully omitted from his response to the Commission's January 31, 1994, letter. Accordingly, it is clear that there is no genuine issue as to any material fact that Kay may have misrepresented or willfully omitted in his response to the Commission's January 31, 1994 letter. In the absence of any allegation by the Bureau of even a single, specific material fact which Kay misrepresented or willfully omitted to disclose, partial summary decision should be granted with respect to Issue 10(a).

Issue 10(c)

Issue 10(c) of the HDO directed the Presiding Judge "to determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules," HDO at paragraph 10(c) (footnotes omitted).

Rule Section 90.155 provides that:

> (a) All stations authorized under this part, except as provided in paragraph (b) of this section and in §§90.629 and 90.631(f), must be placed in operation within eight (8) months from the date of grant or the authorization cancels automatically and must be returned to the Commission.
> (b) For local government entities only ....

(c) For purposes of this section, a base station is not considered to be placed in operation unless at least one associated mobile station is also placed in operation. See also §§90.633(d) and 90.631(f),

47 C.F.R. §90.155. For a licensee to violate Rule Section 90.155, the person would have to fail to place an authorized station in operation within eight (8) months from the date of grant and fail to return the authorization to the Commission.

Rule Section 90.157 provides that:

(a) The license for a station shall cancel automatically upon permanent discontinuance of operations and the licensee shall forward the station license to the Commission. Alternatively, the licensee may notify the Commission of the discontinuance of operations of a station by checking the appropriate box on Form 574—R or Form 405 A and requesting license cancellation. Notification of discontinued operation or cancellation shall be sent to: Federal Communications Commission, Gettysburg, PA 17326.
(b) For the purposes of this section, any station which has not operated for 1 year or more is considered to have been permanently discontinued,

47 C.F.R. §90.157. For an applicant, permittee or licensee to violate Rule Section 90.157, the person would have to discontinue operations permanently and fail to forward the station license to the Commission or fail to notify the Commission of the discontinuance of operations of a station by checking the appropriate box on Form 574—R or Form 405 A and requesting license cancellation.

Rule Section 90.313 provides that:

(a) Except as provided for in paragraph (b), the maximum channel loading on frequencies in the 470-512 MHz band is as follows:
(1) 50 units in the Public Safety Radio Services
(2) 70 units in the Industrial Radio Services (except business).
(3) 90 units in the Business Radio Service.

(4) 150 units in the Taxicab Radio Service, except in the New York Northeast New Jersey urbanized areas where the loading is 200 units.
(5) 70 units in the Railroad, Motor Carrier, and Automobile Emergency Radio Services except in the intra-urban passenger carrier sub-category of the Motor Carrier Radio Service where the loading is 150 units.
(b) If the licensee has exclusive use of a frequency, then the loading standards in paragraph (a) of this section may be exceeded. If it is a shared channel, the loading standards can be exceeded upon submission of a signed statement by all those sharing the channel agreeing to the increase.
(c) A unit is defined as a mobile loading transmitter-receiver. Loading standards will be applied in terms of the number of units actually in use or to be placed in use within 8 months following authorization. A licensee will be required to show that an assigned frequency pair is at full capacity before it may be assigned a second or additional frequency pair. Channel capacity may be reached either by the requirements of a single licensee or by several users sharing a channel. Until a channel is loaded to capacity it will be available for assignment to other users in the same area. A frequency pair may be reassigned at distances 64 km. (40 mi.), 32 km. (20 mi.) for Channel 15, Chicago; Channel 20, Philadelphia; and Channel 17, Washington, or more from the location of the base stations authorized on that pair without reference to loading at the point of original installation. Following authorization, the licensee shall notify the Commission either during or at the close of the 8 month period of the number of units in operation. In the Industrial Radio Services, if the base station facility is to be used by more than a single licensee, the frequency assigned to it will not be reassigned for use by another facility within 64 km. (40 mi.) or 32 km. (20 mi.) where applicable for a period of 12 months. *Provided*, That the facility is constructed within 90 days from the date of the first grant, meets the loading standards to at least 50 percent within 9 months, and meets all loading standards within 12 months,

47 C.F.R. §90.313. To violate Rule Section 90.313, a licensee would have to violate the provisions by failing either to show that an assigned frequency pair is at full capacity before it is assigned a second or additional frequency pair, or by failing to submit the required notification at the close of the eight month period.

Rule Section 90.623 provides that:

> (a) The maximum number of frequency pairs that may be assigned to a licensee for operation in the conventional mode in a given area is five (5).
> (b) Where an applicant proposes to operate a conventional radio system to provide facilities for the use of a single person or entity eligible under subparts B, C, D, or E of this part, the applicant may be assigned only the number of frequency pairs justified on the basis of the requirements of the proposed single user of the system.
> (c) No licensee will be authorized an additional frequency pair for a conventional system within 64 km (40 miles) of an existing conventional system, except where:
> (1) The additional frequency pair will be used to provide radio facilities to a single entity and the additional frequency pair is justified on the basis of the requirements of the proposed single user; or
> (2) The licensee's existing frequency pair(s) is loaded to prescribed levels.
> (d) No licensee will be authorized frequencies for a conventional system if that licensee is operating an unloaded trunked system or has an application pending for a trunked system to serve multiple subscribers within 64 km (40 miles) of the requested conventional system,

47 C.F.R. §90.623. For a licensee to violate Rule Section 90.623, the licensee would have to have been authorized frequencies for a conventional system at a time that the licensee was operating an unloaded trunked system or had an application pending for a trunked system to serve multiple subscribers within 64 km (40 miles) of the requested conventional system.

Rule Section 90.627 provides that:

> (a) The maximum number of frequency pairs that may be assigned at any one time for the operation of a trunked radio system is twenty, except as specified in §90.621(a)(1)(iv).
> (b) No licensee will be authorized an additional trunked system within 64 km (40 miles) of an existing trunked system, except where:
> (1) The additional trunked system will be used to provide radio facilities for a single entity, where the additional system is justified on the basis of requirements of the proposed single user; or,
> (2) The licensee's existing trunked system is loaded to at least 70 mobile and control stations per channel; or,
> (3) A licensee of an SMR system in the 806-821/851-866 MHz bands seeks authorization to operate an SMR system in the 896-901/935-940 MHz bands,

47 C.F.R. §90.627. For a licensee to violate Rule Section 90.627 the licensee would have to obtain more than the maximum number of frequency pairs that may be assigned at any one time for the operation of a trunked radio system or obtain an additional trunked system within 64 km (40 miles) of an existing, unloaded trunked system.

Rule Section 90.631 provides, in relevant part, that:

> (a) Trunked systems will be authorized on the basis of a loading criterion of 100 mobile stations per channel. For purposes of determining compliance with trunked system loading requirements under this subpart the term"mobile station" includes vehicular and portable mobile units and control stations.
> (b) Each applicant for a trunked system shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within 5 years of the initial license grant. Except as provided in paragraph (i) of this section, if at the end of five years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for trunked channels not loaded to 70 mobile stations cancels automatically at a rate that allows the licensee to retain one channel for every 100 mobiles loaded, plus one additional channel. If a trunked system has channels from more than one category, General Category channels are the first channels considered to be cancelled automatically. All licensees who are authorized initially before June 1, 1993, and are within their original license term or are within the term of a two year authorization granted in accordance with paragraph (i) of this section are subject to this condition. A licensee that has authorized channels cancelled due to failure to meet the above loading requirements will not be authorized to obtain additional channels to expand that same system for a period of six months from the date of cancellation.
> (c) Except as provided in paragraph (d) of this section, an applicant seeking to expand a trunked system by requesting additional channels from the Commission, or through intercategory sharing, or through an assignment must have a loading level of 70 mobiles per channel on the existing system that is the subject of the expansion request.
> (e) Except as provided in §90.629, licensees of trunked facilities must complete construction within one year.

47 C.F.R. §90.631. For a licensee to violate Rule Section 90.631 the licensee would have to fail either to have a sufficient number of mobiles per channel on an existing system at the time

of seeking to expand a trunked system or fail to complete construction of a trunked system within one year.

Rule Section 90.633 provides that:

> (a) Conventional systems of communication will be authorized on the basis of a minimum loading criteria of 70 mobile stations for each channel authorized.
> (b) A channel will not be assigned to additional licensees when it is loaded to 70 mobile stations. Where a licensee does not load a channel to 70 mobiles the channel will be available for assignment of other licensees. All authorizations for conventional systems are issued subject to this potential channel sharing condition.
> (c) Except as provided in §90.629 licensees of conventional systems must place their authorized facilities in operation not later than eight months after the date of grant of the license for the system.
> (d) If a station is not placed in operation in eight months, except as provide in §90.629, its license cancels automatically and must be returned to the Commission. For purposes of this section, a base station is not considerate to be placed in operation unless at least one associated mobile station is also placed in operation.
> (e) A licensee may apply for additional frequency pairs if its authorized conventional channel(s) is occupied to 70 mobiles. Applications may be considered for additional channels in areas where spectrum is still available and not applied for, even if the already authorized channel(s) is not loaded to 70 mobile units, upon an appropriate demonstration of need.
> (f) Wide-area systems may be authorized to persons eligible for licensing under subparts B, C, D, or E of this part upon an appropriate showing of need. For loading purposes, if the total number of mobile stations justifies the total number of authorized based frequencies in given area, the system will be construed to be loaded.
> (g) Regional, statewide or ribbon configuration systems may be authorized to persons eligible for licensing under subparts B, C, D or E of this part upon an appropriate showing of need. In a ribbon, regional or statewide system, a mobile station will be counted for channel loading purpose only for the base station facility in the geographic area in which it primarily operates. If this cannot be determined, it will be counted fractionally over the number of base station facilities with which it communicates regularly.

47 C.F.R. §90.633. For a licensee to violate Rule Section 90.633, the licensee would have either to fail to place an authorized station in operation within eight months or to apply for

additional frequency pairs at a time that the licensee's authorized conventional channels were not occupied to 70 mobiles.

At Interrogatory 2-4 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease identify each of Kay's licensed stations which the Commission alleges that Kay either did not construct in a timely manner or deconstructed subsequent to construction." In his April 7 Order, the Presiding Judge found that the "Kay is found to have received responsive answers to his interrogatory questions." The Bureau in its answer to Kay's Interrogatory 2-4, refers Kay to Interrogatory 2-1. The documentation submitted by the Bureau failed to identify even a single station which it alleges that Kay failed to construct and or place in operation in a timely manner. A mere reference to copies of unsubstantiated complaints without an allegation by the Commission concerning a specific station or stations does not create a genuine issue. The Bureau was unable to identify, with specificity, any station which the Commission alleges that Kay either did not construct in a timely manner or deconstructed for a period in excess of one year. Since the Bureau has demonstrated by its response to Kay's Interrogatory 2-4 that it cannot identify even one such station, then there is no genuine issue of material fact which is in dispute with respect to any of the stations for which Kay is authorized, the Bureau has no prima facie case with regard to the construction and operation of any of Kay's licensed facilities, and summary decision in favor of Kay should be granted with respect to Issue 10(c).

At Interrogatory 2-5 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease identify each complaint that the Commission has received that Kay is falsely reporting the number of mobile units he serves in order to avoid the channel sharing and recovery provisions of the Commission's Rules." The Bureau responded by submitting copies of Attachments 1, 2, 3, 5, 7,11, 18, 19, 20, and 22 and indicated that they were copies of complaints in the Bureau's possession received in the last four years regarding the mobile loading of Kay's stations. The Bureau failed to identify a single complaint received by the Commission to support an allegation by the Commission that Kay is falsely reporting the number of mobile units which he serves in order to avoid the channel sharing and recovery provisions of the Commission's rules.

At Interrogatory 2-6 of his First Set of Interrogatories, Kay had requested that the Bureau, "[p]lease identify by call sign, location(s) and frequency(ies) each station concerning which the Commission alleges that Kay has falsely reported the number of mobile units he serves." The Bureau responded by referring Kay to allegations contained in its response to Kay's Interrogatory 2-5. The Bureau's responses to Interrogatory 2-5, were devoid of a single allegation by the Bureau that Kay has falsely reported the number of mobile units which he serves.

At Interrogatory 3-4, Kay requested that the Bureau "[p]lease identify each station on which Kay is alleged to have inflated his loading by reporting the same mobile users on multiple licenses." The Bureau responded to Kay's interrogatory by referring Kay to

allegations contained in its response to Interrogatory 3-2. The responses in reference to Interrogatory 3-2 referred Kay to a copy of the first page of an action filed under the Freedom of Information Act by Kay and his attorneys, the first page of a declaration by James A. Kay, Jr., which contained a statement by Kay that "I hold Federal Communications Commission licenses in my own and other names, in the Private Land Mobile Radio Services ... " and a petition for special relief. Not one of the Bureau's responses identified a single station in which Kay allegedly had inflated his loading by reporting the same mobile users on multiple licenses. The Bureau failed to identify the call sign, location(s) and frequencies of any station concerning which the Commission alleges that Kay has falsely reported the number of mobile units which he serves.

At Interrogatory 3-5 of his First Set of Interrogatories, Kay had requested that the Bureau "[w]ith respect to each station on which Kay is alleged to have inflated his loading by reporting the same mobile users on multiple licenses, please identify each mobile user which Kay is alleged to have reported on multiple licenses." The Bureau responded by referring Kay to its response to Kay's preceding interrogatory. The Bureau's response to the preceding interrogatory referred Kay to the Bureau's response to Kay's Interrogatory 3-2. In not one instance, did the Bureau identify any particular mobile user whom Kay may have reported on multiple licenses. The Bureau failed to identify a single mobile user whom it alleges that Kay reported on multiple licenses.

At Interrogatory 3-6 of his First Set of Interrogatories, Kay had requested "[w]ith respect to each instance in which Kay is alleged to have inflated his loading by reporting the same mobile users on multiple licenses, please state the number of mobile units which Kay is alleged to have reported with respect to each of the multiple licenses." The Bureau responded to Kay's Interrogatory by referring Kay once again to its response to Kay's Interrogatory 3-4. The Bureau failed to identify a single instance wherein Kay allegedly inflated his loading by reporting the same mobile users on multiple licenses or to identify the number of mobile units which Kay is alleged to have reported with respect to each of the multiple licenses.

In its responses to Kay's First Set of Interrogatories, the Bureau failed to identify a single instance or present a single material fact which it alleges would support a Bureau allegation that Kay has, with respect to any specific station or factual situation, violated any of the construction and operation requirements specified at paragraph 10(c) of the HDO. To the extent that the Bureau disclosed requested facts in response to Kay's interrogatories, it should be deemed to have disclosed to Kay all of the material facts which it possesses. To the extent that the Bureau did not disclose facts to Kay in response to his interrogatories which are sufficient to create a genuine issue of material fact, the Presiding Judge should conclude that no such fact exists. Therefore, the Presiding Judge should render a partial summary decision in favor of Kay with respect to Issue 10(c).

Issue 10(d)

Issue 10(d) of the HDO directed the Presiding Judge to "determine whether James A. Kay, Jr. has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629," HDO at paragraph 10(d).

Section 90.623(d) provides that:

> No licensee will be authorized frequencies for a conventional system if that licensee is operating an unloaded trunked system or has an application pending for a trunked system to serve multiple subscribers within 64 km (40 miles) of the requested conventional system.

47 C.F.R. §90.623(d) (Rule Section 90.623(d)).[1] To show that Kay had violated Rule Section 90.623(d), the Bureau would have to show that Kay was authorized frequencies for a conventional system while operating an unloaded trunked system or had an application pending for a trunked system to serve multiple subscribers within 64 km (40 miles) of the requested conventional system.

Commission Rule Section 90.631 provides, in relevant part that:

> (c) Except as provided in paragraph (d) of this section, an applicant seeking to expand a trunked system by requesting additional channels from the Commission, or through intercategory sharing, or through an assignment must have a loading level of 70 mobiles per channel on the existing system that is the subject of the expansion request,

47 C.F.R. 90.631.

[1] Rule Section 90.623 is quoted in its entirety, supra.

Rule Section 90.629 concerns only extended implementation periods and provides that:

> Applicants requesting frequencies for either Trunked or conventional operations may be authorized a period of up to five (5) years for construction and placing a system in operation in accordance with the following:
> (a) The applicant must justify an extended implementation period. The justification must describe the purposed system, state the amount of time necessary to construct and place the system in operation, identify the number of base stations to be constructed and placed in operation during each year of the extended construction period, and show that:
> (1) The proposed system will require longer than eight months (if a conventional system) or one year (if a Trunked system) to construct and place in operation because of its purpose, size, or complexity; or
> (2) The proposed system is to be part of a coordinated or integrated wide area system which will require more than eight months (if a conventional system) or one year (if a Trunked system) to plain, approve, fund, purchase, construct, and place in operation; or
> (3) The applicant is required by law to follow a multi-year cycle for planning, approval, funding, and purchasing the proposed system.
> (4) Where an applicant is required by law to follow a multi-year cycle for planning, approval, funding and purchasing a proposed system, the applicant must indicate whether funding approval has been obtained and if not, when such funding approval is expected.
> (c) Authorizations under this Section are conditioned upon the licensee constructing and placing its system in operation within the authorized implementation period and in accordance with an approved implementation plan of up to five years. Licensees must certify annually that they are in compliance with their yearly station construction commitments, but may request amendment to these commitments at the time they file their annual certifications. If the Commission approves the requested amendments to a licensee's implementation commitments, the licensee's extended implementation authority will remain in effect. If, however, the Commission concludes, at this or any other time, that a licensee has failed to meet its commitments, the Commission will terminate authority for the extended implementation period. When the Commission terminated an extended implementation authority, the affected licensee will be given six months from the date of termination to complete system construction. At the end of any licensee's extended implementation period must comply with the channel loading requirements of section 90.631
> (b). Conventional channels not leaded to 70 mobile units may be subject to shared use by the addition of other licensees.
> (d) Applicants eligible in the Industrial/Land Transportation Category requesting authorizations under this section may request frequencies in the Business Category

only if the application contains a statement that no frequencies in the Industrial/Land Transportation Category are available for assignment in their geographic area.

47 C.F.R. §90.629. Since Kay has never requested or been granted an extended implementation period, he could not possibly have violated Rule Section 90.629.

At Interrogatory 3-1 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease state each relevant fact and the relevant dates as to each and every name listed in paragraph 3 of the HDO which support the basis for the Commission's allegation that Kay may have conducted business under a number of different names." The Bureau responded to Kay's request by listing several of the names under which Kay may have conducted business but failed to state each relevant fact and the relevant dates as to each and every name listed in paragraph 3 of the HDO which support the basis for the Commission's allegation that Kay may have conducted business under a number of different names. The Bureau failed to identify a single factual incident that could support the allegation that Kay allegedly filed applications in multiple names in order to avoid the channel sharing and recovery provisions in violation of Rule Sections 90.623 and 90.629.

At Interrogatory 3-2 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease state with particularity all relevant facts concerning each instance in which Kay is alleged to have filed applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Rule Sections 90.623 and 90.629." The Bureau submitted complaints which the Commission received from Christopher Killian, from Harold Pick, and from James Doering. However, none of the

responses contained any relevant facts concerning each instance in which Kay is alleged to have filed applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Rule Sections 90.623 and 90.629. The Bureau failed to provide any single instance in which it alleges that Kay abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Rule Sections 90.623 and 90.629.

At Interrogatory 3-3 of his First Set of Interrogatories, Kay had requested that the Bureau "[w]ith respect to each of the names listed at paragraph three of the HDO, please state each relevant fact upon which the Commission relies for its belief that Kay may have conducted business under a name other than James A. Kay, Jr." Kay was referred to the Bureau's Answers in response to Interrogatories 3-1 and 3-2. The Bureau cited complaints which merely contained unsupported allegations of other persons, but the Bureau failed to identify even a single incident which the Commission alleges constitutes a genuine issue of material fact. Although the Bureau referred to complaints, the Bureau failed to identify any specific instance in which it alleges that Kay used multiple names to avoid compliance with the Commission's Rules.

In its responses to Kay's First Set of Interrogatories, the Bureau failed to identify a single instance or present a single material fact which it alleges would support a Bureau allegation that Kay conducted business in multiple names for the purpose of violating any

Commission Rule specified at paragraph 10(d) of the HDO. To the extent that the Bureau disclosed facts in response to Kay's interrogatories, it should be deemed to have disclosed to Kay all of the material facts which it possesses. To the extent that the Bureau did not disclose facts to Kay in response to his interrogatories which are sufficient to create a genuine issue of material fact, the Presiding Judge should conclude that no such fact exists. Therefore, the Presiding Judge should render a partial summary decision in favor of Kay with respect to Issue 10(d).

Issue 10(e)

Issue 10(e) of the HDO directed the Presiding Judge "to determine whether James A. Kay, Jr., willfully or maliciously interfered with the radio communications of other systems, in violation of Section 333 of the Act." Section 333 of the Communications Act of 1934, as amended, 47 U.S.C. §333 (Section 333), provides that:

> No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this Act or operated by the United States Government,

47 U.S.C. §333.

For a licensee to violate Section 333, the person would have to interfere willfully or maliciously with or cause interference to the radio communications of any station licensed or authorized by or under the Act or operated by the United States Government. There is no genuine issue of material fact concerning any alleged violation of Section 333 by Kay.

At Interrogatory 4-1 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease state all relevant facts concerning each instance in which Kay is alleged to

have caused interference willfully or maliciously to a radio system or radio station." The Bureau responded by referring Kay to Attachments 21, and 28-38. The attachments contained either unsupported allegations or beliefs by other licensees, but were devoid of even one material fact which could establish a specific allegation by the Bureau that Kay either willfully or maliciously interfered with the radio communications of another system, in violation of Section 333.

At Interrogatory 4-2 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease identify each radio station or system which Kay is alleged to have employed in willfully or maliciously causing interference to another radio system or radio station." The Bureau referred Kay to its response to the preceding interrogatory. The Bureau's response to the preceding interrogatory did not contain any specific instance or fact which would identify any radio station or system which Kay is alleged to have employed in willfully or maliciously causing interference to another radio system or radio station.

At Interrogatory 4-3 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease identify each radio system or radio station which is alleged to have suffered interference which was willfully or maliciously caused by Kay." The Bureau referred Kay to its response to the preceding interrogatory. The Bureau's response to the preceding interrogatory did not contain a specific instance or fact which would identify any radio station or system which is alleged to have suffered interference which was willfully or maliciously caused by Kay.

At Interrogatory 4-4 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease identify each person or entity which is alleged to have suffered interference which was willfully or maliciously caused by Kay." The Bureau referred Kay to its response to the preceding interrogatory. The Bureau's response to the preceding interrogatory did not contain any specific instance or fact which would identify any person or entity which is alleged to have suffered interference which was willfully or maliciously caused by Kay.

At Interrogatory 4-6 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease identify each person who is alleged to have suffered interference willfully or maliciously caused by Kay who was thereafter called on by Kay or his sales staff with an offer to provide the person with higher quality communications service." The Bureau referred Kay to its response to the preceding interrogatory. The Bureau's response to the preceding interrogatory did not contain any specific instance or fact which would identify any person who is alleged to have suffered interference willfully or maliciously caused by Kay who was thereafter called on by Kay or his sales staff with an offer to provide the person with higher quality communications service.

At Interrogatory 4-7 of his First Set of Interrogatories, Kay had requested that the Bureau

> "[w]ith respect to each instance in which Kay is alleged to have willfully or maliciously caused interference to another radio station or system, please describe the means by which Kay is alleged to have caused interference willfully or maliciously to another radio station or system. By way of explanation and not of limitation, the description should set forth, inter alia, the date and time of the alleged interference, the equipment used to cause the interference, the equipment suffering the interference,

and the type or mode of interference (for example, but not limited to, co-channel interference, adjacent channel interference, or intermodulation interference)."

The Bureau referred Kay to its response to the preceding interrogatory. The Bureau's response to the preceding interrogatory did not contain any specific instance or fact which could identify or describe the means by which Kay was alleged to have caused interference willfully or maliciously to another radio station or system. The Bureau failed to submit any type of description such as the date and time of the alleged interference, the equipment used to cause the interference, the equipment suffering the interference, or the type or mode of interference.

In Interrogatories 4-1, 4-2, 4-3, 4-4, 4-6, and 4-7, Kay requested information from the Bureau that could possibly substantiate the allegations in Issue 10(e). The documentation submitted by the Bureau failed to provide even one instance in which the Bureau alleges that Kay willfully, or maliciously interfered with any specific radio station. Since there is no genuine issue of material fact for determination at hearing that Kay ever willfully or maliciously interfered with the radio communications of any other system, partial summary decision should be granted in favor of Kay with respect to Issue 10(e).

Issue 10(f)

Issue 10(f) of the HDO directed the Presiding Judge "to determine whether James A. Kay, Jr. has abused the Commission's processes in order to obtain cancellation of other licenses," HDO at paragraph 10(f).

At Interrogatory 5-1 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease state all relevant facts concerning each instance in which Kay and/or his sales staff is alleged to have misused or abused the Commission's processes." The Bureau referred Kay to Attachments 21, 27, and 39-42 which contained complaints and allegations but not one instance wherein the Bureau identified with specificity any relevant fact establishing that James A. Kay, Jr. has ever abused the Commission's processes in order to obtain cancellation of other licenses.

At Interrogatory 5-2 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease state all relevant facts concerning each instance in which Kay and/or his sales staff is alleged to have fraudulently induced a person or entity to sign a blank Commission form." The Bureau referred Kay to its response to Interrogatory 5-1. The Bureau's response to Interrogatory 5-1 did not contain any specific instance or fact which could identify or describe the means by which Kay is alleged to have fraudulently induced a person or entity to sign a blank Commission form.

At Interrogatory 5-3 of his First Set of Interrogatories, Kay had requested that the Bureau "[p]lease state all relevant facts concerning each instance in which Kay and/or his sales staff is alleged to have induced a person or entity to sign a form, the intent of which was misrepresented by Kay or Kay's employees." The Bureau referred Kay to its response to Interrogatory 5-1. The Bureau's response to Interrogatory 5-1 did not contain any specific instance or fact which could identify or describe the means by which Kay and/or his sales